

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, and Joseph T. Kelliher,

Entergy Services, Inc.

Docket Nos. ER91-569-023  
ER91-569-024  
EL04-123-000

ORDER ON UPDATED MARKET POWER ANALYSIS INSTITUTING SECTION  
206 PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued December 17, 2004)

1. On August 9, 2004, as amended on November 19, 2004, Entergy Services, Inc., on behalf of the Entergy Operating Companies,<sup>1</sup> (collectively, Entergy) submitted for filing the generation market power screens in compliance with the Commission's orders issued on April 14, 2004 and July 8, 2004 and the Commission's data request issued on October 29, 2004.<sup>2</sup> The filing, as amended, indicates that Entergy passes the pivotal supplier screen but fails the wholesale market share screen in each of the four seasons considered in Entergy's control area.<sup>3</sup> The filing, as amended, further indicates that Entergy passes the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier markets examined with market shares below 20 percent in each of the four seasons considered. In addition, intervenors have filed protests alleging that Entergy has market power and requesting customer protection.

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<sup>1</sup> The Entergy Operating Companies are Entergy Arkansas, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, Inc.; Entergy Mississippi, Inc.; and Entergy New Orleans, Inc.

<sup>2</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order). We note that Entergy's market behavior rules were previously accepted by the Commission. *Acadia Power Partners, LLC*, unpublished letter order dated March 29, 2004 in Docket No. ER03-1372-001, *et al.*

<sup>3</sup> Entergy's Filing, as amended, shows that it has a market share as high as 35 percent in the Entergy control area.

2. As we stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 of the Federal Power Act (FPA)<sup>4</sup> and establishes a rebuttable presumption of market power in the section 206 proceeding.<sup>5</sup> Accordingly, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether Entergy may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the Entergy control area because the submittal, as amended, indicates that this is the geographic market for which Entergy fails the wholesale market share screen.

3. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

### **Background**

4. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation. The July 8 Order directed Entergy to file, within thirty days of the issuance of that order, generation market power analyses pursuant to these two indicative screens.<sup>6</sup>

5. On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Entergy’s submittal.

6. On November 19, 2004, Entergy filed a response to the data request. In its response, Entergy provided additional information regarding a Delivered Price Test, the pivotal supplier and wholesale market share screens for its first-tier control areas, the

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<sup>4</sup> 16 U.S.C. § 824e (2000).

<sup>5</sup> April 14 Order, 107 FERC ¶ 61,018 at P 201.

<sup>6</sup> July 8 Order, 108 FERC ¶ 61,029 at Ordering Paragraph (B).

simultaneous transmission import capability study, and the transmission market power, barriers to entry and affiliate abuse/reciprocal dealing prongs of the Commission's four-part test for granting market-based rate authority.

### **Description of Entergy's Filing**

7. In its August 9 Filing, Entergy submits the results of the two generation market power screens, as well as the results of a Delivered Price Test.<sup>7</sup>

8. Entergy states that it passes the pivotal supplier screen in the Entergy control area and in each directly interconnected control area. Entergy further states that it passes the wholesale market share screen in each directly interconnected control area, but that it fails the wholesale market share screen in the Entergy control area for each of the four seasons considered. In response to this failure, Entergy argues that it disagrees with the wholesale market share screen on the basis that it fails to properly account for the effect of capacity dedicated to serve native load. Entergy argues that these skewed results or "false positives" are not indicative of market power.

9. In an effort to rebut the presumption of market power as indicated by the failure of the wholesale market share screen, Entergy submitted the results of its Delivered Price Test analysis, which was conducted using the measures for both economic capacity and available economic capacity. Entergy states that the analysis for available economic capacity demonstrates that it does not have market power in any relevant market, including its own control area. Entergy states that although it fails the Delivered Price Test using the economic capacity measure, the results of this analysis are not meaningful because economic capacity fails to account for native load obligations.

10. Entergy's November 19, 2004 response to the October 29 data request includes a simultaneous transmission import capability study with additional workpapers and documentation and additional information regarding its Delivered Price Test analysis.

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<sup>7</sup> As stated in the April 14 Order, an applicant that fails the initial screens has 60 days from the date of issuance of an order finding a screen failure to: (1) file a Delivered Price Test analysis (if it so chooses); (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; and/or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates. April 14 Order, 107 FERC ¶ 61,018 at P 208. In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. April 14 Order, 107 FERC ¶ 61,018 at P 37. In this case, Entergy has chosen to submit the Delivered Price Test with its initial filing.

In addition, Entergy also provided supplemental information concerning the transmission market power, barriers to entry, and affiliate abuse and/or reciprocal dealing prongs of the Commission's market power analysis.

### **Notice of Filing and Responsive Pleadings**

11. Notice of Entergy's August 9 Filing was published in the *Federal Register*, 69 Fed. Reg. 51,657 (2004), with interventions or protests due on or before August 30, 2004.

12. Timely motions to intervene raising no substantive comments were filed by East Texas Electric Cooperative, Inc., Tex-La Electric Cooperative of Texas, Inc., and Sam Rayburn G&T Electric Cooperative, Inc. (collectively, East Texas Cooperatives);<sup>8</sup> the City of Benton, Arkansas, the City of North Little Rock, Arkansas, the City of Prescott, Arkansas, the West Memphis, Arkansas Utilities Commission, the Conway Corporation, Hope Water & Light Commission, and Farmer's Electric Cooperative Corporation (collectively, Arkansas Cities); Plum Point Energy Associates, LLC; Sempra Energy Resources; and Southeast Electricity Consumers Association. PSEG Power LLC and PSEG Energy Resources & Trade LLC (jointly, PSEG) and The Dow Chemical Company filed late motions to intervene with no substantive comments.

13. On August 17, 2004, Occidental Chemical Corporation (Occidental) filed motions to intervene, request that the Commission issue a deficiency order, extend protest and comment period, initiate a section 206 proceeding and set a refund effective date (August 17 Filing).<sup>9</sup> Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, and Public Service Commission of Yazoo City (collectively, MDEA); American Public Power Association (APPA); and Arkansas Electric Cooperative Corporation (Arkansas Electric Cooperative) filed timely motions to intervene, protest and answer in support of Occidental's August 17 Filing. Occidental and Arkansas Electric Cooperative also filed additional, timely protests.

14. The following parties also filed timely motions to intervene, protest or comment: Arkansas Electric Energy Consumers, Inc. (Arkansas Electric Energy Consumers); Calpine Corporation, Shell Trading Gas and Power Company, and Cottonwood Energy Company, LP (collectively, Calpine); Lafayette Utilities System, Louisiana Energy and Power Authority and the Municipal Energy Agency of Mississippi, (collectively, L-M

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<sup>8</sup> East Texas Cooperatives have intervened in the underlying proceedings leading to Entergy's instant Filing.

<sup>9</sup> Occidental notes that it has previously intervened in Entergy's three-year market-based rate review proceeding.

Municipals);<sup>10</sup> Electricity Consumers Resource Council (ELCON); Electric Power Supply Association (EPSA); Tractebel Energy Marketing, Inc. (Tractebel); and Union Power Partners, L.P. (Union Power).

15. NRG Power Marketing, Inc., Louisiana Generating LLC, Bayou Cove Peaking Power LLC, Big Cajun I Peaking Power LLC, LSP Energy Limited Partnership, and NRG Sterlington Power LLC (collectively, NRG) filed a late motion to intervene and protest. Tenaska, Inc. (Tenaska) filed a late motion to intervene and comment.

16. On September 1, 2004, Entergy Services, Inc., on behalf of Entergy Louisiana, Inc., filed an answer to Occidental's August 17 Filing (September 1 Answer).<sup>11</sup> On September 13, 2004, Entergy filed an answer to the protests (September 13 Answer). On September 28, 2004, NRG filed an answer to Entergy's answer. On October 13, 2004, Entergy filed an answer to NRG's protest (October 13 Answer).

17. On October 15, 2004, Occidental filed a motion to renew its pending motions. On November 1, 2004, Entergy filed an answer to Occidental's motion to renew its pending motions.

18. Notice of Entergy's November 19, 2004 Filing in Docket No. ER91-569-024 was published in the *Federal Register*, 69 Fed. Reg. 69,596 (2004), with interventions or protests due on or before December 7, 2004. On December 7, 2004, L-M Municipals, Calpine and Occidental filed protests.

### **Summary of Pleadings**

19. Several intervenors argue that the Commission should issue a deficiency order and extend the comment period because Entergy's August 9 Filing lacks the requisite data and supporting information necessary to corroborate the results.<sup>12</sup> They also ask the

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<sup>10</sup> L-M Municipals filed a conditional motion to intervene noting that they are already intervenors in the underlying proceeding, but are submitting the instant motion to the extent the Commission deems it necessary for them to renew their earlier intervention or submit a new motion in light of the passage of time.

<sup>11</sup> Although the Filing was made only on behalf of Entergy Louisiana Inc., for simplicity, we will continue to use Entergy.

<sup>12</sup> See, e.g., protests or comments of Occidental (August 17 Filing), Arkansas Electric Cooperative, Arkansas Electric Energy Consumers, APPA, ELCON, MDEA, Tractebel and Union Power.

Commission to initiate a section 206 proceeding and set a refund effective date to protect ratepayers by ensuring that meaningful remedies are available while the proceeding is pending.<sup>13</sup>

20. Several intervenors ask the Commission to examine all four parts of Entergy's market power analysis.<sup>14</sup> They argue that, in addition to generation market power, Entergy has transmission market power, the ability to erect barriers to entry, and the ability to engage in affiliate abuse or reciprocal dealing. EPSA and Occidental point in particular to concerns over transmission access in the Entergy market. EPSA asserts that because Entergy's transmission configuration precludes competing generators from being designated as network resources, transmission access is an enormous barrier to entry in Entergy's control area. L-M Municipals contend that Entergy restricts the entry of potential competitors by proposing deliverability requirements for new network resources that would effectively give Entergy control over the availability of sites for new generation.

21. Several intervenors assert that since Entergy states that it fails one of the indicative screens and its own Delivered Price Test, the proceeding should shift immediately into developing mitigation measures to address Entergy's market power. NRG asserts that the mitigation measures must address the totality of Entergy's market power, not solely generation market shares. NRG requests that the Commission focus, in particular, on transmission market power. Intervenors recommend that the Commission adopt a variety of near-term mitigation measures to address Entergy's market power, including: (1) requiring competitive solicitations for supply procurement; (2) requiring security constrained, economic dispatch; (3) requiring an independent Open Access Same-Time Information System administrator (OASIS) administrator; (4) requiring independent market monitoring; (5) requiring Entergy to hire an independent consultant to investigate the lack of available transmission capacity on the Entergy system; and (6) assigning Commission enforcement staff for on-site monitoring of Entergy's transmission operations.<sup>15</sup>

22. In its September 1 Answer, Entergy states that it includes the required data and workpapers necessary to corroborate the results stated in its August 9 Filing, except for the simultaneous transmission import capability studies, which have been posted on its

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<sup>13</sup> See, e.g., protests or comments of Occidental (August 17 Filing), Arkansas Electric Cooperative, Arkansas Electric Energy Consumers, APPA, Calpine, ELCON, EPSA, L-M Municipals, MDEA, Tenaska, Tractebel and Union Power.

<sup>14</sup> See, e.g., protests or comments of Calpine, EPSA, L-M Municipals, NRG, Occidental, and Tenaska.

<sup>15</sup> See protests and comments of EPSA and NRG.

OASIS site. Furthermore, Entergy contends that there is no need for the Commission to initiate a section 206 proceeding in this matter or to establish a refund effective date. Entergy argues that the April 14 and July 8 Orders established indicative screens and invited applicants to submit a definitive Delivered Price Test analysis to rebut any presumption of market power created by a failure of either of the indicative screens. It notes that it has submitted the definitive Delivered Price Test analysis and states that the record shows that it does not have market power in any relevant geographic market and, therefore, there is no reason or basis to initiate a section 206 proceeding or establish a refund effective date. In its September 13 Answer, Entergy argues that the protesters are impermissibly seeking to expand the scope of the instant proceeding to include transmission market power and related concerns. Entergy contends that these requests are impermissible requests for rehearing of the April 14 and July 8 Orders. In addition, Entergy argues that protesters have proposed various mitigation measures which are premature at this stage of the proceeding.

23. NRG responds to Entergy's argument that intervenors are impermissibly seeking to expand the scope of the instant proceeding by noting that the FPA prohibits the Commission from authorizing an entity to sell energy at market-based rates if the entity has market power of any kind, unless that market power has been adequately mitigated. NRG asserts that a review that focused exclusively on Entergy's generation market power would not adequately assess Entergy's ability or incentive to exercise market power and foreclose competition.

24. L-M Municipals question the assumption of 16,656 MW of "uncommitted rival capacity" within the Entergy control area and the 4,164 MW of rival capacity from first-tier imports. L-M Municipals state that this assumption ignores the frequent and well-known problems that non-affiliated generators have encountered in securing needed transmission. L-M Municipals also state that Entergy does not provide an accurate reflection of simultaneous imports and does not make an effort to determine if the imports and internal availability of transmission resulting from the study reflect the "real world" ability of rival generators to gain transmission to meet contested loads. L-M Municipals also state that Entergy's failure to provide its simultaneous transmission import capability studies would be a serious omission under any conditions. According to L-M Municipals, that omission is even more problematic in light of long-standing concerns about Entergy's use of TTC and ATC calculations to foreclose its rivals from access to Open Access Transmission Tariff (OATT) services.

25. APPA argues that Entergy's Delivered Price Test is not realistic because it does not consider the effects of generation market power within constrained areas in its control area. APPA argues that Entergy's internal constraints have substantial impacts on the deliverability of energy from independent generation sources within the Entergy control

area to APPA members. APPA states that the Commission's regulations make clear that a Delivered Price Test must include an evaluation of available transmission capability to deliver the product to the relevant market.<sup>16</sup>

26. Calpine contends that the Commission should not assume that by having an OATT and Standards of Conduct on file, Entergy lacks transmission market power. Calpine states that Entergy remains a vertically-integrated utility with a dominant market position in the four-state region in which it operates, and that Entergy's market dominance has not been mitigated through participation in any Commission-authorized transmission organization or in an independently administered market structure.

27. Occidental contends that Entergy has incorrectly modeled the transmission constraints that have been identified as preventing wholesale supplies to the market. Occidental also claims that Entergy has improperly favored its merchant function to the detriment of competitors -- especially Qualifying Facility competitors. Occidental further contends that Entergy ignores the complaints of numerous competing generators and that Entergy's procurement practices have disadvantaged competing generators and given undue preference to Entergy's own generation affiliates

28. In their December 7 Filings, Occidental, Calpine and L-M Municipals filed comments and protests regarding Entergy's November 19 response to the October 29 data request reiterating prior arguments.

## **Discussion**

### **Procedural Matters**

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of this proceeding and the absence of undue delay or prejudice, we find good cause to grant the untimely, unopposed motions to intervene.

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Entergy's and NRG's answers because they have provided information that assisted us in our decision-making process.

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<sup>16</sup> Citing 18 C.F.R. §§ 33.3(c)(4)(i)(C) (2004); 33.3(c)(7); 33.3(c)(8); and 33.3(c) (12) (2004).



**Market-Based Rate Authorization**

31. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.<sup>17</sup>

**Generation Market Power**

32. As noted above, in the April 14 Order, the Commission adopted two indicative screens for assessing generation market power. Entergy performed the generation market power screens for its first-tier control areas. The Commission has reviewed Entergy's generation market power screens, as amended, for the first-tier control areas, which indicate that Entergy passes both the pivotal supplier and wholesale market share screens in these geographic markets. Further, the Commission finds that Entergy has complied with the directives in the April 14 Order, as clarified by the July 8 Order, regarding performing a simultaneous transmission import capability study and relies on the results of that study herein.<sup>18</sup> Accordingly, the Commission finds that Entergy satisfies the Commission's generation market power standard for the grant of market-based rate authority in the first-tier control areas.

33. Entergy states in its August 9 Filing, as amended, that Entergy's share of uncommitted capacity in the Entergy control area exceeds 20 percent for each of the four seasons during the time period considered. Consequently, Entergy's filing indicates that Entergy fails the wholesale market share screen in Entergy's control area.

34. In its submission, Entergy presents alternative evidence in the form of a Delivered Price Test to rebut the presumption of market power. Entergy states that it fails the Delivered Price Test using the economic capacity measure, one of the measures prescribed in the April 14 and July 8 Orders.<sup>19</sup> However, Entergy argues that, although it

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<sup>17</sup> See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,921-22 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899-900 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

<sup>18</sup> The Commission finds no merit to Entergy's argument that the screens are flawed. Our July 8 Order considered, and rejected arguments regarding potential flaws in the Commission's pivotal supplier and market share screens.

<sup>19</sup> April 14 Order, 107 FERC ¶ 61,018 at P 106 – 109.

fails the Delivered Price Test using the economic capacity measure, Entergy believes that it passes the Delivered Price Test using the available economic capacity measure, another measure prescribed in the April 14 and July 8 Orders.<sup>20</sup>

35. In its November 19 response to the data request, Entergy states that it conducted sensitivity analyses, which show that it continues to fail the Delivered Price Test using the economic capacity measure and continues to pass the Delivered Price Test using the available economic capacity measure. Entergy states that when it uses the economic capacity measure, its market position results in screen violations because the economic capacity measure does not include native load offsets to capacity and because of its position as the vertically-integrated utility in its own control area. Entergy attests that it passes the Commission's market screens in all relevant markets, including the Entergy control area.

36. As outlined in the April 14 Order, Entergy's failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to Entergy's control area, to examine whether Entergy may continue to charge market-based rates, and establishes a rebuttable presumption of market power. The section 206 proceeding will review Entergy's Delivered Price Test, including Entergy's response to the Commission's data request regarding this test. The instant order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

37. Our decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Entergy has market power in the Entergy control area.

38. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent,<sup>21</sup> we will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL04-123-000 is published in the

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<sup>20</sup> August 9 Filing, Attachment 1, p.p. 15-16 and Exhibit JSH-8.

<sup>21</sup> See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

*Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by April 29, 2005.

### **Transmission Market Power**

39. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an OATT on file before granting such authorization. In its response to the data request, Entergy states that it has an OATT on file with the Commission. We note that Entergy's OATT was accepted by Commission order in *Entergy Services, Inc.*, 77 FERC ¶ 61,145 (1996). Based on Entergy's representation, the Commission finds that Entergy satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

40. We recognize that protesters have expressed concerns that Entergy may have the ability to exercise transmission market power. However, we believe that such arguments would be more appropriately raised in a separate complaint proceeding. We further note that some of the arguments raised by protesters are being addressed by the Commission in an order being issued contemporaneously with this one.<sup>22</sup>

### **Barriers to Entry**

41. In its response to the data request, Entergy states that neither it nor its affiliates can erect barriers to entry that would prevent competitors from participating in the relevant markets. Entergy states that neither it nor its affiliates exercise control over sites for generating plants that could restrict entry by other suppliers. Further, Entergy states that it is not aware of any lack of potential generation sites in the Entergy control area. Entergy states that it has an indirect affiliated pipeline, Gulf South, in Louisiana. According to Entergy, Gulf South is an open-access pipeline and both it and Entergy operate separately in accordance with the Commission's requirements. Entergy also states that there are ample supply alternatives to Gulf South as illustrated by Gulf South's interconnection with over 100 competitor pipelines and its proximity to Henry Hub. Based on Entergy's representations, the Commission is satisfied that Entergy cannot erect barriers to entry.<sup>23</sup>

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<sup>22</sup> *Entergy Services, Inc.*, 109 FERC ¶ 61,281 (2004) (Docket Nos. ER03-1272-003 and EL05-22-000).

<sup>23</sup> See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

42. We recognize that protesters have expressed concerns that Entergy may have the ability to erect barriers to entry. However, we believe that such arguments would be more appropriately raised in a separate complaint proceeding.

### **Affiliate Abuse**

43. The Commission is also concerned with the potential for affiliate abuse. In its response to the data request, Entergy states that it and its affiliates with market-based rate authority have operated in accordance with the safeguards adopted by the Commission to protect against affiliate abuse and reciprocal dealing for transactions under market-based rate authority. Entergy states that there have been no material changes in circumstances from Entergy's prior filings wherein the Commission concluded that Entergy and its affiliates employed appropriate safeguards to protect against affiliate abuse and reciprocal dealing for transactions under market-based rate authority. Based on Entergy's representations, Entergy satisfies the Commission's concerns with regard to affiliate abuse.

44. We recognize protesters have expressed concerns regarding affiliate abuse. However, we believe that such arguments would be more appropriately raised in a separate complaint proceeding.

### **Reporting Requirements**

45. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.<sup>24</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>25</sup>

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<sup>24</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/Electric/eqr/eqr.htm>.

<sup>25</sup> The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture  
(continued)

46. With regard to reporting changes in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing, in a Notice of Proposed Rulemaking in Docket No. RM04-14-000, the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates.<sup>26</sup> Accordingly, the change in status reporting obligation for Entergy is subject to the outcome of the rulemaking.

### **Motion for Extension of Time**

47. As noted above, Occidental filed a motion for extension of time to file comments and protests in response to Entergy's August 9 Filing. In this order, the Commission has instituted a section 206 proceeding and requested additional information to supplement the record. As discussed above, Entergy's response will be noticed and an opportunity will be provided for intervenors to file comments or protests. Accordingly, Occidental's motion is dismissed as moot.

### **The Commission orders:**

(A) Entergy's updated market power analysis for all relevant markets not subject to the section 206 proceeding is hereby accepted for filing, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL04-123-000 concerning the justness and reasonableness of Entergy's market-based rates, as discussed in the body of this order.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the Federal Power Act in Docket No. EL04-123-000.

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of market-based rate authority, requiring Filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

<sup>26</sup> *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004).

(D) The refund effective date in Docket No. EL04-123-000 will be 60 days following publication in the *Federal Register* of the notice discussed in Ordering Paragraph (C) above.

(E) Occidental's motion to extend the time for filing of comments and protests is dismissed as moot, as discussed in the body of this.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Magalie R. Salas,  
Secretary.